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In The United States District Court

LARRY E. Johnson  
Petitioner

v.

Warden Perry Phelps  
and the Attorney General  
of the State of Delaware  
Respondents



Petition Under USC(28) 2254  
 writ of Habeas Corpus

Appendix to opening Brief

July 21, 2008

Pro SE, LARRY E. Johnson #277320  
1181 Paddock Rd.  
Smyrna, DE  
19977

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, ID# 0309013358  
0309013375

v.

DONALD COLE,  
LARRY JOHNSON,  
Defendants.

BEFORE: HONORABLE SUSAN C. DeLPESCO, J.  
and jury

Pre-trial and Opening Statements  
JULY 20, 2004

SUPERIOR COURT REPORTERS  
500 North King Street, Suite 2609  
Wilmington, Delaware 19801-3725  
(302) 255-0570

1 JULY 20, 2004  
2 Courtroom No. 8B  
3 9:30 a.m.

3 PRESENT:

4 As noted.

5 - - - - -

6  
7 MR. MILLER: Your Honor, good morning. We  
8 were sitting in the anteroom. We are still  
9 discussing and having a strategy meeting, for lack  
10 of a better term, on this issue of Johnson's prior  
11 acquittal. Will the Court grant us another five  
12 minutes or so until quarter after to finish this  
13 discussion?

14 THE COURT: Yes. However, if there's any  
15 authority that anybody wants me to consider in  
16 connection with any of the arguments this morning,  
17 I would like to see it now.

18 MR. FIGLIOLA: Your Honor, I can state, and  
19 Mr. Miller agrees, there is absolutely zero  
20 authority directly on point as to what happens with  
21 the fact that there was an acquittal in the case.

22 THE COURT: Okay. Well, then your answer is  
23 no --

2  
APPEARANCES:

WILLIAM L. GEORGE, JR., ESQ.  
DANIEL R. MILLER, ESQ.  
Deputy Attorney General  
for the State

MICHAEL C. HEYDEN, ESQ.  
JAN A.T. vanAMERONGEN, JR., ESQ.  
for the Defendant Donald Cole

ANTHONY A. FIGLIOLA, JR., ESQ.  
EDWARD C. PANKOWSKI, JR., ESQ.  
for the Defendant Larry Johnson

4  
1 MR. FIGLIOLA: Nothing directly on point. I  
2 have three cases that may lend some guidance to  
3 Your Honor, one is State of Delaware versus William  
4 T. Hardin. It was an opinion by Judge Cooch in the  
5 Superior Court. Then Leeallan D. Cobb versus State  
6 of Delaware and Arthur Milligan versus State of  
7 Delaware. Milligan dealt with a conviction in the  
8 State of Maryland where acquittal was granted.

9 Also, Your Honor -- and I did not bring a  
10 copy of this because for some reason it only would  
11 print out to page nine. State of Delaware versus  
12 Frank Joseph Sherrin, 441 A.2 235, lends some  
13 guidance to it, in particular, concerning federal  
14 charges and what had to be proven, etcetera.

15 THE COURT: All right. Well, then, we will  
16 recess for what, ten minutes?

17 MR. MILLER: We have two cases. Neither of  
18 them directly address the acquittal issue. But I'm  
19 handing them forward because they generally touch  
20 upon this, which is Dowling versus United States  
21 and State versus Mauchin. Thank you, Your Honor.

22 THE COURT: All right.

23 (Brief recess.)

1 THE COURT: Good morning. Who would like to  
2 begin?

3 MR. MILLER: I can do that, Your Honor.

4 THE COURT: All right.

5 MR. MILLER: Judge, we take the firm  
6 position, and the same position that we took  
7 yesterday, there are multiple reasons why, number  
8 one, this evidence is admissible, which is, from  
9 Detective Silvers and other fact witnesses that saw  
10 Mr. Johnson at the time of the vehicle stop on  
11 November the 12th.

12 Basically the issues, as far as  
13 admissibility go, are addressed in both the Dowling  
14 case and the Mauchin case, Judge Cooch's decision,  
15 those decisions both stand for the proposition that  
16 unless the prior proceeding had the same burden of  
17 proof, number one, and, number two, all of the  
18 items of all the offenses were precisely the same,  
19 then the State is not collaterally estopped by the  
20 double jeopardy clause from introducing evidence of  
21 prior or subsequent conduct, in this case  
22 subsequent conduct, connecting the defendant under  
23 -- in this case to the gun that was found under the

1 fact testimony of the scene, which is clearly  
2 admissible under both Dowling and Mauchin.

3 But, number two, with the same evidentiary  
4 argument that the State made yesterday, if this  
5 jury is told either by the Court or through a  
6 witness that defendant Johnson on a previous  
7 occasion was charged with and acquitted by another  
8 jury of possession of this particular weapon and  
9 whether it was transported in Interstate Commerce,  
10 they will by definition be speculating as to what  
11 the reasons were that that jury may have done that.

12 We don't know, and this jury won't know,  
13 what the witnesses testified like, how they  
14 appeared on the stand, their demeanor. This jury  
15 won't know why that other jury may have decided  
16 what it decided, whether it was based on questions  
17 about whether the defendant was actually in  
18 possession of the gun or whether he was not,  
19 whether it was related to the Interstate Commerce  
20 element. But even putting that aside, it's still a  
21 different burden of proof, and the jury would be  
22 sitting here, hearing the evidence and not having  
23 to make a decision as to the burden of proof that

6

1 vehicle, which is subsequently ballistically linked  
2 to the murder scene itself.

3 The Dowling case -- none of the cases I  
4 should say, address the issue of whether it is  
5 proper for the trial court, or anybody, to  
6 introduce evidence of the fact, if it is a fact,  
7 that a defendant has been acquitted of the charge,  
8 or, in this case, subsequent conduct, in the  
9 Dowling case prior conduct, that he went to trial  
10 for and was acquitted.

11 In the trial court's decision and in the  
12 Third Circuit decision it's noted that the trial  
13 judge did advise the jury in the Dowling case that  
14 the defendant had been previously acquitted. The  
15 Supreme Court in the Dowling decision I handed up  
16 to the Court doesn't touch it at all. Justice  
17 White's decision does not address, one way or the  
18 other, whether they think that advising the jury  
19 that a defendant has previously been acquitted of  
20 charges that the State is subsequently seeking to  
21 admit is proper or improper, which leads us to the  
22 decision, number one, as far as the admissibility  
23 of Detective Silvers' testimony, let's call it the

8

1 doesn't exist as to the November 12th stop whereas  
2 in the prior case the jury was charged that the  
3 burden of proof was beyond a reasonable doubt.

4 The prejudicial impact on this jury of  
5 finding out what another jury, with a different  
6 burden of proof, on a different occasion, with  
7 different elements of the crime and also different  
8 evidence decided as to whether Mr. Johnson was in  
9 possession of that gun.

10 For example, let's assume for purposes of  
11 discussion that it is a fact, and it is, I can  
12 represent to the Court, that that jury on the prior  
13 occasion never heard testimony from Travanion  
14 Norton or any other witness that tied Mr. Johnson,  
15 a second eyewitness, that tied Mr. Johnson to this  
16 particular gun, nor did they hear the ballistics  
17 tie in.

18 In our case here we have evidence from  
19 Travanion Norton that defendant Johnson was in  
20 possession of that gun. We have evidence from  
21 Detective Silvers that Johnson was in possession of  
22 that gun on November 12th. And we have a  
23 ballistics expert that links the two weapons.

1 The prior jury did not hear from the  
2 ballistics expert and they didn't hear from  
3 Travonion Norton. All they had to rely on was the  
4 police testimony. And, again, I don't want to  
5 overstate it, but, for the last time, different  
6 burden of proof, different facts, different jury.

7 THE COURT: What is the applicable burden of  
8 proof here?

9 MR. MILLER: Preponderance of the evidence.

10 THE COURT: Because it's not a crime  
11 charged?

12 MR. MILLER: That's correct, Your Honor.  
13 It's an issue of admissibility. It's noted in the  
14 Dowling position. Huddleston versus the United  
15 States is the case that decided that when you are  
16 introducing evidence of other conduct, not charged  
17 conduct, the burden of proof is -- it is a  
18 question, number one, for the trial judge and the  
19 issue is preponderance of the evidence.

20 THE COURT: Will it be necessary for the  
21 police officer to say that there was an arrest? In  
22 other words, here's my question: It isn't  
23 necessarily illegal for a person driving an

1 up came and all the occupants in the car were  
2 secured, then he looked under the car, saw that the  
3 weapon was there.

4 Do we need to get into the fact that he was  
5 formally arrested? I don't think so. But we do  
6 need to be able to get into the fact that --  
7 there's no way of separating out the fact that the  
8 detective had to pull his gun or felt the need to  
9 pull his gun based on Mr. Johnson's actions and  
10 that he was, at least, detained at the scene.

11 I don't think -- even if the jury --  
12 obviously, Your Honor, if the jury found that he  
13 had been arrested -- I mean I guess arguably  
14 Johnson could claim some prejudice, but if they  
15 don't later find out that he wasn't formally  
16 charged or that he was indicted in Federal Court,  
17 they don't need to know those things. I don't  
18 think there's a way really of -- I would call it I  
19 guess inextricably intertwined doctrine. In other  
20 words, there's no way of pulling out of there.

21 THE COURT: You can certainly say he was  
22 detained.

23 MR. MILLER: I would be happy to use that.

10

1 automobile who is stopped by the police, and even  
2 if they choose to discard the weapon, that's not  
3 necessarily a crime, is it?

4 MR. MILLER: It's actually not a crime, Your  
5 Honor. If you're in possession of a weapon and  
6 it's not concealed and you're not a person  
7 prohibited, it's not illegal conduct.

8 THE COURT: Will it be necessary for the  
9 officer to say that there was an arrest?

10 MR. MILLER: It would be almost impossible  
11 for him not to say that, because the circumstances  
12 he will testify to are that he was walking up to  
13 the car -- I'm summarizing but he -- they saw the  
14 defendant sitting in the car, they swung their  
15 vehicle around, as he was walking up to  
16 Mr. Johnson, Mr. Johnson and he made eye contact,  
17 Mr. Johnson had a female on his lap at the time, he  
18 pushed her out the door of the car, threw something  
19 under the car, the detective heard the clink of  
20 metal on concrete or asphalt and he immediately  
21 drew his weapon and pointed it at Mr. Johnson,  
22 ordered him out of the car, arrested him --  
23 actually waited for back up to come, and after back

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1 And I will instruct the witnesses not to say he was  
2 arrested. It's just from my standpoint or the  
3 standpoint of the State it's always a dangerous  
4 road to say we're not going to use the word victim  
5 or arrest, we're not going to do this and it  
6 happens and then there is a request for a mistrial.

7 I don't think that we need to make a ruling  
8 that the police cannot say they arrested him. We  
9 just need to avoid discussion of the formal arrest  
10 and the fact that he was subsequently indicted and  
11 prosecuted.

12 THE COURT: All right. Can I hear from  
13 counsel for Mr. Johnson?

14 MR. FIGLIOLA: Your Honor, I expressed  
15 yesterday -- I agree with Mr. Miller's assessment  
16 to the Court that there is absolutely no case law  
17 out there that addresses the real issue that we  
18 brought up yesterday, that is, whether the fact  
19 that Mr. Johnson was acquitted of these charges  
20 should go in front of the jury.

21 What I've heard this morning is that, in  
22 essence, the State is going to be trying  
23 Mr. Johnson on those charges again. They're going

1 to put to detective on there, describe what he  
2 claims he saw, the same facts that he gave to the  
3 Court in Federal Court where the burden of proof  
4 was beyond a reasonable doubt, and a jury in that  
5 Federal Court has acquitted Mr. Johnson of these  
6 charges.

7 Now, in reviewing the Dowling case, in  
8 reviewing the Sherrin case we look at what the  
9 Federal Government had to prove and what the State  
10 of Delaware would have had to prove if in fact  
11 these charges were brought in State Court.

12 THE COURT: Why does that help? The issue  
13 here is admissibility and the question here is the  
14 burden of proof.

15 MR. FIGLIOLA: The point is this, Your  
16 Honor, if Mr. Johnson has been acquitted of these  
17 charges, what, in essence, the State is doing by  
18 putting these charges in front of the jury again is  
19 trying Mr. Johnson for the same crime for which he  
20 has been acquitted.

21 Now, we're not disputing the fact that they  
22 can say Mr. Johnson was found with a weapon. Our  
23 point is full disclosure says you gotta tell the

1 man was acquitted.

2 Now, the State, in essence, by putting in  
3 that evidence, they're going to force the defendant  
4 to defend for a second time charges that he has  
5 already been acquitted of. That was not a plan by  
6 the defense. It was not contemplated by the  
7 defense. I'm not saying we couldn't do it. I  
8 don't know. We have to find the witnesses that  
9 were there at the time. I've talked with  
10 Mr. Natale this morning who defended Mr. Johnson.  
11 But that's what the State, in essence, is asking  
12 the Court to allow, a retrial of Mr. Johnson on  
13 these charges.

14 If they want to put the evidence in, that's  
15 fine, but we should be entitled to let the jury  
16 know that he was acquitted of these charges in  
17 Federal Court. That's our position.

18 THE COURT: Okay. Does this have anything  
19 to do with opening statements?

20 MR. FIGLIOLA: Well, I think it may. If  
21 it's referred to in opening statement and Your  
22 Honor rules, depending on Your Honor's ruling, it  
23 may create problems later on.

14

1 jury he was found with a weapon, he was charged and  
2 he was acquitted.

3 THE COURT: Okay. So you're not saying that  
4 the State can't offer the testimony, you're just  
5 saying that they have to go the next step?

6 MR. FIGLIOLA: Correct. I mean they're  
7 talking about prejudice to them. What about  
8 prejudice to the defendant? He's the one that's on  
9 trial for his life. That's the prejudice we have  
10 to look at. This is a prior act or an act  
11 associated with this --

12 THE COURT: It's subsequent in time.

13 MR. FIGLIOLA: Subsequent in time. But it  
14 is an act. It's tied in to this matter. He was  
15 charged with the crime. He was acquitted of the  
16 crime. That is relevant evidence to the innocent  
17 or guilt of this man.

18 Now, that doesn't say that because the jury  
19 found that he didn't have a gun on November the  
20 11th, that he didn't have a gun in August, but the  
21 jury is entitled to know that in another Court the  
22 exact same charges on the exact same evidence that  
23 the State wants to put in front of this jury this

16

1 THE COURT: Okay. Let me hear from the  
2 State.

3 MR. MILLER: May I have one moment with  
4 counsel, Your Honor?

5 THE COURT: Yes.

6 MR. HEYDEN: Your Honor, may I address on  
7 this question also?

8 THE COURT: Just a moment.

9 MR. MILLER: Can we hear from defendant Cole  
10 while we're having this discussion, Your Honor?

11 MR. HEYDEN: Just briefly, Your Honor. The  
12 facts concerning the stop and seizure of the gun,  
13 as I understand it, was at -- there was a number of  
14 people, six, seven people, sitting in a car. The  
15 police officer approached the car, and, as he did  
16 that, he heard a thud that sounded like metal hit  
17 the ground.

18 Now in his report, and I don't think this  
19 will be disputed by the State, the police officer  
20 is not going to testify that he saw that gun in the  
21 actual possession of Mr. Johnson. But he got there  
22 and he jumped or reached a conclusion that  
23 Mr. Johnson, as opposed to the other people in the

1 car, was the person who was in possession of the  
2 gun.

3 Now, the case goes to trial in Federal Court  
4 and the jury acquitted Mr. Johnson. They reached a  
5 different conclusion based upon the evidence. So  
6 we have the police officer looking at some evidence  
7 and jumping to a conclusion and you have the jury  
8 looking at evidence and reaching a conclusion. I  
9 don't think the State could have it both ways.

10 I don't think they can come in and let this  
11 officer testify and give the impression to the jury  
12 that he saw Mr. Johnson in possession of this gun  
13 without letting the Court permit the defense to  
14 introduce the acquittal into evidence.

15 So I think it's either they -- if they both  
16 come in, that's fine, but if we don't get the  
17 acquittal into evidence, I don't think the police  
18 officer's conclusion is permissible.

19 MR. MILLER: Your Honor, I have a compromise  
20 position. It's clear from the case law that the  
21 evidence is admissible and it's not collaterally  
22 estopped based on the cases that have been  
23 provided. The issue has evolved into the admission

1 was going to be able to introduce there was an  
2 acquittal it wouldn't be until, at least, that  
3 point where either the Court or someone else would  
4 inform the jury what happened.

5 So we have a couple of days. I think that  
6 may be the wisest position. We obviously feel it's  
7 important for this jury to know in opening the  
8 allegations related to the vehicle stop, and we  
9 have made those intentions known for six months or  
10 more. We're presented with a situation on the eve  
11 of trial where the defense, in response to a State  
12 inquiry, let its position be known about  
13 introduction of an acquittal where the case law is  
14 either vacant or we haven't been able to find it  
15 yet. And it seems to me that we should defer the  
16 issue.

17 I'm sure the defense -- in speaking to  
18 Mr. Figliola, he wants to bring it up in his  
19 opening because he wants the jury to know that.  
20 But the defense has put the Court and the State in  
21 a position of not being able to fully research a  
22 fairly important and potentially -- fairly  
23 important issue on the eve of -- you know, we're

18

1 of the acquittal or not.

2 So as far as Mr. George in his opening can  
3 refer to this vehicle stop and what was seen and  
4 what was allegedly recovered during the vehicle  
5 stop, it appears, unless there's case law to the  
6 contrary that I haven't seen yet, that that  
7 evidence is admissible.

8 That leads to the second question of the  
9 acquittal. This came up -- I mean we are in a  
10 capital murder trial. This came up yesterday  
11 afternoon, the first time, at least, I became aware  
12 that the defense intended to attempt to introduce a  
13 verdict of a jury in another case to rebut the  
14 State's argument here.

15 I think we defer the issue of ruling  
16 presently on whether the acquittal is admissible or  
17 not, because we really don't know right now whether  
18 it is or not. And maybe -- and I did what I could  
19 last night. But it would be -- I think the  
20 appropriate thing to do is to put the issue aside  
21 for now, allow the openings to go forward. And  
22 we're not going to get to Detective Silvers'  
23 testimony for a couple of days. And if the defense

20

1 supposed to open in five minutes. So that seems to  
2 me to be the course that we are requesting, Your  
3 Honor.

4 MR. FIGLIOLA: Your Honor, I know I was not  
5 put on notice. I don't believe Mr. Pankowski was.  
6 And I don't know about the other defendant. We  
7 were aware of this charge certainly. We had no  
8 idea the State was going to do anything with it  
9 until yesterday.

10 THE COURT: With what?

11 MR. FIGLIOLA: Bringing in the fact that  
12 Johnson was arrested with a weapons charge, because  
13 he was acquitted.

14 THE COURT: Well, the link of that third  
15 incident has been on the table since the first.

16 MR. FIGLIOLA: We knew about it. Nobody  
17 said they were going to use it.

18 MR. MILLER: Your Honor, that is a difficult  
19 position for the State to accept. We have provided  
20 the ballistics analysis to the defendants and the  
21 expert opinion.

22 THE COURT: I think that it's clear now that  
23 we narrowed it down to very specific issue, and,

1 that is, not whether or not the evidence can come  
2 in as to the stop but whether or not the evidence  
3 can also come in as to the acquittal. And as has  
4 been said we're supposed to have opening statements  
5 in a few minutes. And it seems to me while it  
6 would be preferable to have the ruling in advance  
7 of opening statements, under these circumstances it  
8 is too significant a ruling for me to have to  
9 consider based on authority handed to me at  
10 five minutes after ten. So I will adopt the  
11 State's recommendation and I will defer it until I  
12 can resolve it.

13 But I will tell you that based on my cursory  
14 review of what's been provided, I'm satisfied that  
15 it's admissible and it's just a question of whether  
16 or not the defendant will have the opportunity to  
17 inform the jury that there was an acquittal of the  
18 charges.

19 MR. FIGLIOLA: Your Honor, the problem I  
20 have with -- Mr. Miller and I did discuss that.  
21 The problem I have with that, Your Honor, is that  
22 you're allowing -- if my understanding is correct,  
23 you're allowing the State to bring out this

1 proposed redactions is fine with defendant Johnson.  
2 I spoke with Mr. Van Amerongen. He provided me  
3 with three areas where there is a disagreement.  
4 Two of the three areas I am going to agree with him  
5 and take in or put out what the defense requests.  
6 The only area of disagreement that remains is to  
7 whether the State can admit the evidence of  
8 Mr. Cole's alleged threats to Mr. Norton a couple  
9 of days after the incident.

10 If the Court can provide a ruling to us  
11 based on that, then I can have a paralegal get that  
12 transcript, at least maybe at lunchtime time, at  
13 least, we can send it to the engineer. He's  
14 indicated he can produce the tape overnight.

15 THE COURT: I need to have something in some  
16 context. The statement has previously been  
17 provided, I suppose, but I don't have it in front  
18 of me. This doesn't have any bearing on opening  
19 statements, does it?

20 MR. MILLER: It does not. It just has a  
21 bearing on me getting this information, you know --  
22 getting this information to the sound engineer so  
23 he can make the redactions or not, depending on how

22

1 evidence in their opening statement, yet I'm not  
2 going to be allowed to address it in my opening  
3 statement.

4 THE COURT: Correct.

5 MR. FIGLIOLA: That's a problem.

6 THE COURT: Well, it is a problem. But  
7 you're defending -- and if it's ultimately  
8 determined to be admissible, I think it's perfectly  
9 logical that in your defense of the case you can  
10 bring that out. That's just the way it is given  
11 the circumstances that we have at this point.

12 All right. Is there anything else before  
13 opening statements? Has the State's witness, the  
14 woman that you mentioned yesterday, did she appear?

15 MR. MILLER: Yes, Your Honor.

16 THE COURT: So are we going to open and we  
17 are going to start, right?

18 MR. MILLER: Yes, Your Honor.

19 There is one other issue, Your Honor, we  
20 discussed yesterday in terms of this 3507 statement  
21 from Mr. Norton and the potential use of that.

22 Mr. Figliola has indicated to me that the  
23 transcript that we provided to him with the

24

1 the Court rules. There's no dispute of fact of  
2 what is alleged to have been said, just a question  
3 of whether or not evidence is admissible or not.

4 THE COURT: I don't want to have to deal  
5 with this on the fly. I need to look at this in  
6 context. There were two issues yesterday. I'm  
7 trying to remember. One of them had to do with the  
8 statements while they were on the same pod. I  
9 surmise you're abandoning that?

10 MR. MILLER: It doesn't relate to the 3507  
11 statement and I probably will abandon it, but  
12 that's not on the table right now, Your Honor.

13 THE COURT: Well, all right.

14 MR. MILLER: I wouldn't go into that without  
15 bringing it up to everybody again, because  
16 obviously there are concerns that are raised.

17 THE COURT: I would like to defer the 3507  
18 discussion until I've heard opening statement and  
19 you get started here. I realize that may not be  
20 convenient, but it's not convenient for me to  
21 decide that right now.

22 MR. MILLER: Very good, Your Honor.

23 THE COURT: That's what you're asking me to

1 Q. So they never talked about what they were  
2 going to take?  
3 A. No.  
4 Q. In fact, they never said they were going to  
5 take anything, did they?  
6 A. They said a sting.  
7 Q. A sting.  
8 Now, when you saw them going into your  
9 friend's house, Shaheed, did you pick up your cell  
10 phone and call Shaheed and say, warn your parents?  
11 A. No.  
12 Q. You didn't?  
13 Now, at this time did you have the gun in  
14 your hand.  
15 A. No. I mean what time are you talking about?  
16 Q. When you see Mr. Cole up --  
17 A. I would ask that you be direct. Because  
18 some of these questions I don't understand.  
19 Q. All right. When did you get the gun? Let's  
20 be direct.  
21 A. In the car.  
22 Q. In the car. So what you're standing there,  
23 when you get to Shaheed's house, you see Mr. Cole

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1 going through a window, okay, you had the gun in  
2 your hand?  
3 A. No, I didn't have it in my hand.  
4 Q. Where was it?  
5 A. It was in my possession but it wasn't in my  
6 hand.  
7 Q. Okay. But you had it?  
8 A. Yeah.  
9 Q. Did you ever think of pointing the gun at  
10 Mr. Cole and say, stop right there?  
11 A. No.  
12 Q. No. Why not?  
13 A. I mean I just didn't. I mean you have to  
14 think, Mr. Cole and Mr. Johnson was in the  
15 backyard, so if I pointed the gun at Mr. Cole to  
16 stop, how do you know Mr. Johnson wouldn't have  
17 shot me.  
18 Q. You weren't willing to take the chance?  
19 A. No, not at all.  
20 Q. So after this sting started what did they  
21 look for inside the house?  
22 A. I don't know. Like I told you I came in  
23 when I heard the bang. After I came in there was

1 kicking and then after that there was shooting, so  
2 I didn't see nobody searching too much for nothing.  
3 Q. So nobody searched for anything, two people  
4 come of a doorway and they are in essence executed?  
5 A. Yes.  
6 Q. Was it is after this execution that Sticky  
7 found out who Connect was?  
8 A. No. I'm not even too sure when he found  
9 out.  
10 MR. FIGLIOLA: Nothing further.  
11 THE COURT: Mr. Miller.  
12 MR. MILLER: May I have one moment. I don't  
13 think that prompts any redirect, Your Honor, but I  
14 would like to have a moment.  
15 THE COURT: Very well.  
16 MR. MILLER: That prompts no redirect.  
17 Thank you, Mr. Norton..  
18 MR. HEYDEN: Nothing, Your Honor. Thank  
19 You.  
20 THE COURT: Very well. You may remove  
21 Mr. Norton.  
22 MR. MILLER: Your Honor, may I step outside  
23 just to check and see if a witness is here?

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1 \* THE COURT: I'm thinking about a recess.  
2 How are you guys doing? Are you doing all right?  
3 THE JURORS: Fine.  
4 THE COURT: All right.  
5 You may step out.  
6 MR. MILLER: Thank you, Your Honor.  
7 State calls Detective Jeff Silvers please.  
8 THE COURT: Could I see the attorneys at  
9 sidebar please.  
10 (The following sidebar conference was held.)  
11 THE COURT: I want to hear his testimony  
12 outside the presence of the jury.  
13 MR. MILLER: Okay. We have a transcript of  
14 his prior testimony at the suppression hearing  
15 with me. I know exactly what he said then and he  
16 probably will say it now.  
17 THE COURT: Well --  
18 MR. HEYDEN: It's a dangerous area.  
19 MR. MILLER: I guess I'm misunderstanding.  
20 I'm not seeing what the issue is. I thought we had  
21 overcome this. You mean the acquittal issue?  
22 THE COURT: Yes.  
23 MR. MILLER: I don't know in any way that it

1 would be introduced that it would be through this  
2 witness.

3 THE COURT: That's what I'm trying to  
4 determine.

5 MR. MILLER: I think it is a legal issue.  
6 It doesn't have to do with the words that he spoke.

7 THE COURT: It has a lot to do with the  
8 words that he speaks. To me I need to know what  
9 boundaries I can put on this, because I just see  
10 this whole thing as a slippery slope. If he would  
11 get to a point where we talk about arrests and I  
12 have to deal with the equity of not getting into  
13 the fact that he was acquitted, and it could go  
14 into the fact that he was acquitted. And then I  
15 have to get into the fact what acquittal means.  
16 And it doesn't mean he was innocent. It means that  
17 the State hasn't met its burden of proof.

18 I far prefer to put some boundaries on his  
19 testimony. I would have asked for the transcript  
20 before. I didn't know.

21 MR. FIGLIOLA: Your Honor, I got it from  
22 Mr. Natale, who represented Mr. Vanson in Federal  
23 Court, I guess Tuesday this week. We made copies

1 that. What's wrong with that, in this case, as I  
2 understand it, was the fact that he was stopped,  
3 that the policeman approached him, that for  
4 whatever reason the police thought they needed to  
5 investigate, that he made a gesture and that later  
6 the gun was found under the car.

7 Now, is there anything more than that?

8 MR. MILLER: Other than the fact that  
9 when -- the officer will say when he reached down,  
10 he was sitting there, he saw him, he reached down,  
11 the officer immediately thought that he was going  
12 for something and he pulled his gun out and drew on  
13 it.

14 THE COURT: Okay. But the point is that  
15 once you get that in, what happened after that  
16 doesn't matter.

17 MR. MILLER: It's fine with me. But we're  
18 going to have to instruct him on that.

19 THE COURT: Okay. Is everybody on the same  
20 page here?

21 MR. MILLER: I would have to take him back  
22 out of the court room.

23 THE COURT: That's all right. We will

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1 and I gave Mr. Miller a copy yesterday.

2 THE COURT: Okay. Well, I'm not faulting  
3 anybody. I'm just saying the only thing I could  
4 think of in terms of trying to get a handle of his  
5 testimony is to hear it. But I didn't know there  
6 was any alternative available. It still seems like  
7 the best thing to do under the circumstances. It  
8 sounds to me based on earlier representations --  
9 well, let me back up.

10 I suggested earlier to the State that you  
11 get the facts in and that you not talk about an  
12 arrest. And you said you couldn't do that, that  
13 that was just unmanageable or something.

14 MR. MILLER: What -- I'm sorry, Your Honor,  
15 I don't mean to interrupt. What I was trying to  
16 say, I think doing that sometimes makes it -- it  
17 makes it difficult, because if somebody slips and  
18 says something then we have an issue.

19 I can advise him of that. I mean and tell  
20 him look, all you're going to say is detained,  
21 because they called for backup, they put him on the  
22 curb, they handcuffed him.

23 THE COURT: I'm sure you have to get to

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1 recess for a couple of minutes then.

2 MR. MILLER: All right.

3 THE COURT: We are going to have a brief  
4 recess. Take the jury out please.  
5 (Jury leaves courtroom at 4:20.)

6 THE COURT: Recess for 10 minutes.  
7 (Brief recess.)

8 THE COURT: I've given you a curative  
9 instruction that I prepared and invite your  
10 comments.

11 MR. FIGLIOLA: Your Honor, I guess the first  
12 thing is since we're getting a back action  
13 instruction, which we would anticipate, I question  
14 whether Your Honor needs to do a Getz analysis for  
15 the record.

16 After that's done, as to this instruction  
17 itself, we object to the last sentence nor are you  
18 to speculate about the outcome of the  
19 November 12th, 2001 vehicle stop. We simply  
20 suggest there was, in fact, an arrest, charges and  
21 subsequent litigation, and if we're not going to be  
22 able to state that that litigation resulted in a  
23 judging of acquittal, we would rather not have it

1 in there.

2 THE COURT: I would -- I put that in there  
3 because I thought you would like it. So I merely  
4 didn't anticipate your reaction. Would you prefer  
5 that I strike that last sentence?

6 MR. FIGLIOLA: Yes.

7 THE COURT: You would rather have him  
8 speculating or wondering about what happened  
9 without any direction? Because they're not going  
10 to hear the whole story. All they're going to hear  
11 is part of the story and that later the police  
12 retrieved the gun. I mean we could add something  
13 in the final instructions if you want.

14 MR. FIGLIOLA: I anticipate, Your Honor,  
15 that -- I anticipate Mr. Johnson testifying, I had  
16 anticipated going into detail on Mr. Johnson's  
17 convictions, one of which will not relate to this  
18 incident, so I think --

19 THE COURT: All right. Fine. That was put  
20 in there for your benefit. If you prefer to have  
21 it stricken, unless the State feels differently, I  
22 will strike it.

23 MR. MILLER: We take no position, Your

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1 Honor. I don't know what Cole's position is, if  
2 there is one. But I would like to know what that  
3 is before we go forward.

4 THE COURT: We're just about running out of  
5 time for the day.

6 MR. HEYDEN: We take no position, Your  
7 Honor.

8 MR. MILLER: Same. We're fine with taking  
9 the sentence out, Your Honor. If the defendant  
10 Johnson wants it out, then we're okay with that.

11 THE COURT: The question of a balancing  
12 here, I think it's obvious, or at least I think  
13 perhaps I should ask the State. It appears to me  
14 that your objective in presenting this evidence is  
15 identification.

16 MR. MILLER: Correct.

17 THE COURT: And that's done through the  
18 ballistics, that's your theory?

19 MR. MILLER: Yes.

20 THE COURT: Okay. And that's why it's  
21 admissible?

22 MR. MILLER: Right. He's actually in  
23 possession of one of the guns that was used at the

1 murder scene. We will argue it's not a bad act

2 because he didn't get caught doing anything illegal  
3 with it, but we're okay giving the instruction if  
4 defendant wants that. We think if he wants the  
5 last sentence stricken, we're okay with that too.

6 THE COURT: But the point is -- Mr. Figliola  
7 is approaching the podium.

8 MR. FIGLIOLA: The point is, Your Honor, he  
9 was not found in possession of it. It was found  
10 under the vehicle he was in. That's different than  
11 being in possession of it.

12 I guess, for argument sake, if Mr. Miller  
13 wants to say he was in possession of that that's an  
14 issue -- the possession issue went to a jury.

15 THE COURT: I understand. But my concern  
16 here -- do you differ on the concept of a curative  
17 instruction?

18 MR. FIGLIOLA: No. I think it needs a  
19 curative instruction.

20 THE COURT: All right. And I think we're  
21 all saying the same thing here. I have to give the  
22 instruction. And to the extent there's any issue  
23 as to whether or not the probative value outweighs

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1 the prejudicial effect, I think it's clearly  
2 material and I'm not going to read that phrase, by  
3 the way, and the words bad act I just wrote that  
4 for my benefit. It's an issue and relative to the  
5 dispute in this case, and therefore I will permit  
6 the testimony to be offered.

7 The question is, can we get it in in  
8 20 minutes?

9 MR. MILLER: I'm going to be fairly trimmed  
10 down with my direct, but it will still take ten  
11 minutes.

12 THE COURT: Should we resume with this  
13 tomorrow morning or not?

14 MR. MILLER: I would prefer to do it now,  
15 Your Honor, even if it goes a few minutes past  
16 five.

17 THE COURT: Okay. Let's bring the jury in.  
18 (Jury enters courtroom at 4:40.)

19 JEFFREY SILVERS, having been called on the  
20 part and behalf of the State as a witness, being  
21 first duly sworn under oath, testified as follows:

22 THE COURT: Before you start,  
23 Mr. Miller. Ladies and gentlemen, you're about to

1 hear testimony regarding a vehicle stop involving  
2 Larry Johnson which occurred on November 12th,  
3 2001.

4 Its evidence is provided by the State in  
5 support of its claim that Larry Johnson was  
6 involved in the August 31st, 2001 murders on 23rd  
7 Street.

8 You may consider the testimony offered for  
9 one purpose only, and that purpose is determining  
10 whether the State has met its burden of proof  
11 regarding the identity of the person or persons who  
12 committed the murders on 23rd Street.

13 You may not use the information to draw  
14 conclusions about Mr. Johnson's character.

15 All right. Mr. Miller

16 MR. MILLER: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. MILLER:

19 Q. Officer Silvers, what unit -- or where do  
20 you work, sir?

21 A. City of Wilmington Police Department.

22 Q. How long have you been a police officer?

23 A. Here approximately six-and-a-half-years. I

1 Q. And were you on foot or were you guys in  
2 car?

3 A. We were in an unmarked police car.

4 Q. What area of the city were you in?

5 A. In the East Side of the city, the 600-block  
6 East 5th Street.

7 Q. Okay. And did you notice anything -- strike  
8 that. Let me back up. Who was driving, if you  
9 remember?

10 A. Detective Richie.

11 Q. And where were you seated?

12 A. Behind the passenger, in the back seat.

13 Q. And did there come a time when either you or  
14 someone else in the car noticed something that  
15 caught your attention?

16 A. Yes.

17 Q. Tell the members of the jury what was  
18 noticed.

19 A. We were driving south on Spruce Street,  
20 Detective Taylor looked Westbound on 5th Street,  
21 saw a group of people standing on the sidewalk  
22 around a couple of cars there and suggested we go  
23 down and check out what was going on.

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1 was in another state for two years.

2 Q. Where was that?

3 A. In the State of Maine.

4 Q. So all told a little bit over eight years?

5 A. Yes.

6 Q. What is your current assignment?

7 A. Plain clothes detective in the drug,  
8 organized crime and vice division.

9 Q. I see you have a goat-tee there. Is that  
10 standard wear for the guys in Vice?

11 A. Yes. We don't wear uniforms. We generally  
12 wear jeans and T-shirts to fit in better in the  
13 neighborhoods.

14 Q. Were you working in Vice back on November  
15 the 12th 2001?

16 A. Yes, I was.

17 Q. And how long had you been with the Vice  
18 unit?

19 A. That was my first day.

20 Q. And were you working alone?

21 A. No, I was not.

22 Q. Who were you with?

23 A. Detective Taylor and Detective Richie.

1 Q. And what did you do or what did the car do?

2 A. Detective Richie continued down on 4th  
3 Street, went west on 4th, then north on Pine Street  
4 and then eastbound on 5th Street against one-way  
5 traffic.

6 Q. Say again.

7 A. Against one-way traffic on 5th Street.

8 Q. So 5th Street is a one-way street?

9 A. In that section, yes, it's one way  
10 westbound.

11 Q. And you guys went the wrong way?

12 A. Correct.

13 Q. Why did you do that?

14 A. Try to sneak up on them a little bit.

15 Q. Okay. And you mentioned that normally you  
16 didn't wear a uniform in Vice.

17 It's your first day. Do you remember if you  
18 had a uniform on that day?

19 A. No, I did not.

20 Q. Did you have a badge displayed in any  
21 fashion?

22 A. Yes, I did. I had a badge on a chain  
23 hanging around my neck about the center of my

1 chest.  
 2 Q. As best you can, I would like you to tell  
 3 the jury what you saw when you swung onto 5th  
 4 Street going the wrong way heading toward this  
 5 group that you mentioned.  
 6 A. Well, we made the right-hand turn onto 5th  
 7 Street. There was a group of people on the  
 8 sidewalk. As we got closer to the two cars,  
 9 Detective Taylor saw two people, two black males,  
 10 run off from the area.  
 11 Q. When you say from the area, what area are  
 12 you talking about?  
 13 A. From the 600 block of East 5th Street.  
 14 Q. The two people that took off running, were  
 15 they in the area of the street or were they in the  
 16 area of the sidewalk?  
 17 A. Sidewalk.  
 18 Q. Okay. Did you notice anything about any  
 19 vehicles that were in the area? Were there any  
 20 cars parked there?  
 21 A. Yes.  
 22 Q. Describe to the jury what you saw.  
 23 A. There was a light in color Chevy Lumina and

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1 I believe it was a Dodge Stratus parked, a darker  
 2 colored Dodge Stratus, parked behind it.  
 3 Q. Which car, if either of them, did you have  
 4 your attention focused on?  
 5 A. The Lumina.  
 6 Q. Tell the members of the jury what you saw --  
 7 you mentioned your type of car was?  
 8 A. Our car was also a Chevy Lumina.  
 9 Q. So you're driving against traffic or the  
 10 wrong way on a one-way street in a Lumina, you're  
 11 in the back seat?  
 12 A. Correct.  
 13 Q. You notice there is a Lumina and then a  
 14 Stratus parked behind it?  
 15 A. Correct.  
 16 Q. Tell the members of the jury what you saw in  
 17 relation to the occupants of the Lumina.  
 18 A. I focused on -- Detective Taylor was sitting  
 19 in front of me. And he's sort of a large man. I  
 20 couldn't see a whole lot around him. I focused on  
 21 the driver's side of the vehicle. That's all I  
 22 could see.  
 23 Q. In terms of the way their vehicle was

1 facing -- you indicated you went the wrong way.  
 2 Were they facing towards you, in other words, their  
 3 headlights facing towards yours?  
 4 A. Correct. They were parked on the south side  
 5 of the street, facing westbound. We were coming  
 6 down the street eastbound.  
 7 Q. Okay. So when you were looking at the  
 8 driver of -- the front part of their Lumina, the  
 9 Lumina that was parked, were you looking out the  
 10 right-hand side or the left-hand side of your car?  
 11 A. Right-hand side.  
 12 Q. As you're looking out the right-hand side of  
 13 the rear passenger seat window, at the Lumina, what  
 14 did you see?  
 15 A. Well, as we were pulling up, I saw the two  
 16 guys run from the sidewalk area.  
 17 Q. Were those two guys anywhere near the front  
 18 door or -- the front door of the Lumina that was  
 19 parked or the passenger door?  
 20 A. They started running as we started coming  
 21 down the block. They were on the sidewalk side so  
 22 they were nowhere near the passenger side. They  
 23 were on the sidewalk and took off running. I

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1 couldn't tell how close they were to any cars.  
 2 Q. Got you. Go ahead.  
 3 A. As we pulled down the street, there were a  
 4 few people standing on the sidewalk right along the  
 5 fence line. When we pulled up, we exited the car,  
 6 Detective Taylor and I got out about the same time.  
 7 I focused in on the driver, the person seated in  
 8 the driver's seat, and went and started going over  
 9 in that direction.  
 10 Q. Do you see the person that was in the  
 11 driver's seat of the Lumina that was parked that  
 12 you guys came up and were facing in the court room  
 13 today?  
 14 A. Yes, I do.  
 15 Q. Can you point him out for the members of the  
 16 jury?  
 17 A. He's seated at the rear defense table with  
 18 the light blue shirt on.  
 19 MR. MILLER: The record should reflect the  
 20 witness has identified the defendant Larry Johnson.  
 21 BY MR. MILLER:  
 22 Q. Tell the members of the jury what you  
 23 saw -- where was Mr. Johnson in this whole thing?

1 Where was he seated or standing or whatever?  
2 A. He was seated in the driver's seat of the  
3 Lumina.  
4 Q. Was he by himself?  
5 A. No. There was a female sitting in his lap.  
6 Q. In the driver's seat?  
7 A. Correct.  
8 Q. Was the door to the Chevy Lumina that  
9 Mr. Johnson was in, with the female in his lap,  
10 open or closed?  
11 A. Open.  
12 Q. Tell the members of the jury what you saw as  
13 you approached Mr. Johnson on foot.  
14 A. Mr. Johnson was sitting in the driver's  
15 seat, the female was sitting kind of 90 degrees  
16 with her feet sitting outside the door of the car.  
17 When I stepped out, I looked right at  
18 Mr. Johnson. He kind of had a surprised look on  
19 his face. His eyes got real big. He then lifted  
20 and pushed the female off of his lap onto the  
21 sidewalk, and she then walked away from the car.  
22 At that point Detective Taylor was yelling  
23 show your hands, show your hands. Mr. Johnson then

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1 reached down below my view down towards the floor  
2 of the car.  
3 Q. I want to stop you there. I want you to  
4 actually show the jury -- pretend for a moment that  
5 you're Mr. Johnson and I want you to physically  
6 back up enough so you can physically show the jury  
7 what you saw him do with his hands during that  
8 time.  
9 THE COURT: Excuse me. I don't know that  
10 the jury can see.  
11 MR. MILLER: Maybe if you could slide to the  
12 open area.  
13 THE WITNESS: When I was there I was  
14 standing in front of the car, so the dashboard was  
15 actually blocking what I could see also.  
16 BY MR. MILLER:  
17 Q. So this jury box actually provides a pretty  
18 decent vantage point as far as the jury --  
19 A. Correct. Because I was standing in front of  
20 the car looking through with the dashboard. So a  
21 normal -- if you're standing in front of a car  
22 looking at a car, what you would see is what I saw.  
23 Q. I want to walk toward you, and I want you to

1 say stop when I'm as close to you as you were to  
2 Mr. Johnson when you saw him make the motion that  
3 you're about to describe.  
4 A. Stop. Right in that general vicinity.  
5 MR. MILLER: The record should reflect maybe  
6 between 10 and 12 feet, Your Honor.  
7 Go ahead. Tell the members of the jury what  
8 you saw from this position.  
9 THE COURT: Initially when we came out, I  
10 saw him lift and push the female out. At that  
11 point I saw his right hand on her back, as he was  
12 pushing her out. His hands then went down below to  
13 where I couldn't see them and then around to the  
14 side. And at that point I heard a metal object  
15 strike the ground. Detective Taylor still yelling  
16 show your hands. His hands came out to the side,  
17 out the open door.  
18 BY MR. MILLER:  
19 Q. You say you heard the sound of something  
20 metal hit the ground. What did you think it was?  
21 A. I thought it was a weapon. I thought it was  
22 a gun.  
23 Q. Why did you think that?

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1 A. We train three times a year at a range with  
2 an asphalt ground, and we train 10 to 25 people  
3 shooting at a time. Over the last several years  
4 people have dropped guns while we've been at that  
5 range and the sound was familiar to me as the sound  
6 of that.  
7 Q. When you first saw him -- after Officer  
8 Taylor was yelling for people to show their hands  
9 and you indicate that he reached down below  
10 his -- what area of the car did he reach down  
11 toward?  
12 A. He reached towards -- I couldn't tell if it  
13 was the floor or under the seat. It was down low.  
14 It looked to be the floor area or close to the  
15 front of underneath the seat.  
16 Q. What did you do when you saw him do that?  
17 A. Draw my weapon.  
18 Q. And go ahead and try to describe -- did you  
19 stay where you were or did you approach the car?  
20 A. I was slowly moving around the front end of  
21 the car. When I saw his hands go down, I drew my  
22 weapon, pointed it at him and slowly moved around  
23 the front of the car.

1 Q. Toward which side?

2 A. Towards the open door. I was going around  
3 or slowly going around the driver's side of the  
4 door.

5 Q. You indicated previously at one point he put  
6 his hands out the door?

7 A. Correct.

8 Q. During the time that you got out of your car  
9 or as you pulled up there, got out of your car,  
10 walked toward the car, saw what you just saw, drew  
11 your weapon and came to the side of the car, did  
12 you ever see anyone else in the immediate area of  
13 that driver's side door?

14 A. No.

15 Q. Did you see anybody else look like they drew  
16 something there?

17 A. No.

18 Q. Continue. You indicated that you drew your  
19 weapon and were approaching Mr. Johnson?

20 A. Correct. As I drew my weapon and started  
21 coming around the side, once his hands came back up  
22 and into my view, they came out through the open  
23 door. I then went around the car and detained

1 marked for identification. May I approach the  
2 witness, Your Honor?

3 THE COURT: Yes.

4 BY MR. MILLER:

5 Q. Showing you what's been marked as State's U  
6 for identification, do you recognize that?

7 A. Yes.

8 Q. What does that appear to be?

9 A. That's a photograph of the weapon that I  
10 recovered that evening.

11 Q. And when did you take that photo?

12 A. After it had been processed.

13 Q. When you say processed, for latent  
14 fingerprints?

15 A. Yes.

16 Q. Were there any of value found on that  
17 weapon?

18 A. No.

19 Q. Were you present when the weapon was  
20 processed?

21 A. Yes.

22 MR. MILLER: I would like to move this item  
23 into evidence, Your Honor.

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1 Mr. Johnson.

2 Q. Okay. After you detained Mr. Johnson, did  
3 you look under the car?

4 A. Yes.

5 Q. Tell the members of the jury what you saw  
6 when you looked under the vehicle.

7 A. I saw a handgun underneath the car.

8 Q. Did you leave it there or what did you do?

9 A. No, I recovered it. I pulled that gun out  
10 and set it up on the roof of the car and cleared  
11 it, making it safe to handle.

12 Q. Okay. When you say cleared it, you mean?  
13 Just briefly describe it. It may be obvious to  
14 most people, but.

15 A. Opened the gun up, took the bullets out of  
16 the gun, make it safe to handle.

17 Q. Did you later take that weapon back to the  
18 police station with you?

19 A. Yes.

20 Q. And did you request that an officer process  
21 that gun for latent fingerprints?

22 A. Yes.

23 MR. MILLER: I would like to have this

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1 THE COURT: Any objection?

2 MR. FIGLIOLA: No, Your Honor.

3 MR. HEYDEN: No, Your Honor.

4 THE CLERK: State's Exhibit 70 is so marked,  
5 Your Honor.

6 MR. MILLER: Could I ask the bailiff to turn  
7 the Elmo on.

8 BY MR. MILLER:

9 Q. Officer, the picture should come up shortly.  
10 There we go.

11 You indicated this is the gun?

12 A. Yes.

13 Q. There's a manila envelope underneath the  
14 gun?

15 A. Yes.

16 Q. There appears to be some powder, some  
17 blackness around the edges of this manila folder.  
18 What is that?

19 A. The powder used to dust the gun for prints.

20 Q. And you indicated you took this photograph  
21 on that night?

22 A. Yes, I did.

23 MR. MILLER: I would like to have this item

A14

1 marked for identification, Your Honor.

2 THE CLERK: State's identification V is so  
3 marked, Your Honor.

4 BY MR. MILLER:

5 Q. Showing what's been marked State's  
6 identification V, without showing the jury the  
7 context of that box, can you take a look at it and  
8 tell me if that appears to be the weapon that you  
9 recovered that night during what you just  
10 described?

11 A. Yes.

12 MR. MILLER: I move that item into evidence,  
13 Your Honor.

14 Your Honor, without objection we would like  
15 to enter this as the next State's exhibit.

16 MR. HEYDEN: That's correct.

17 THE CLERK: State's Exhibit 71 is so marked,  
18 Your Honor.

19 THE COURT: Mr. Figliola, no objection?

20 MR. FIGLIOLA: No objection, Your Honor.

21 MR. MILLER: And, Your Honor, if I can just  
22 briefly display these items to the jury.

23 THE COURT: Why don't you have him tell us

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1 what they are.

2 BY MR. MILLER:

3 Q. Can you show the items to the jury and tell  
4 us what they appear to be. At least show the jury  
5 what items that you recovered that night.

6 THE COURT: Recovered from where?

7 MR. MILLER: I'm sorry, Your Honor.

8 THE COURT: Recovered from?

9 MR. MILLER: Underneath the car.

10 THE COURT: Oh, underneath the car, okay.

11 MR. MILLER: Go ahead.

12 THE WITNESS: 17 live nine-millimeter  
13 bullets, which were loaded into the magazine for  
14 the gun.

15 BY MR. MILLER:

16 Q. And was the magazine in or out of the gun?

17 A. In the gun. When I cleared it to make it  
18 safe, I took that out of the gun.

19 Q. Is that the weapon itself?

20 A. Yes.

21 Q. Can you just display that briefly for the  
22 jury.

23 A. (Indicating).

1 Q. What kind of weapon is that?

2 A. It is a Luger model P89, 9-millimeter  
3 handgun.

4 Q. 9-millimeter handgun?

5 A. Yes.

6 MR. MILLER: I have no further questions for  
7 this witness, Your Honor.

8 THE COURT: Mr. Heyden.

9 MR. HEYDEN: Thank you.

10 CROSS-EXAMINATION

11 BY MR. HEYDEN:

12 Q. Officer, good afternoon.

13 A. Good afternoon.

14 Q. Let me make sure that I understand the  
15 position of the cars and all.

16 You're the Johnson vehicle, okay?

17 A. Okay.

18 Q. And you're traveling in this direction?

19 A. It's parked alongside the street.

20 Q. I'm sorry. You're parked.

21 And the car that you were in was coming in  
22 this direction?

23 A. Correct.

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1 Q. All right. On that side of the road?

2 A. Down the center of the street.

3 Q. Down the center?

4 A. Yes.

5 Q. So then the cars are facing each other?

6 A. Correct.

7 Q. And you're on the -- from where you are in  
8 the Johnson vehicle to your left would be the  
9 sidewalk?

10 A. Correct.

11 Q. And then to your right would be the rest of  
12 the roadway?

13 A. Correct.

14 Q. Okay. And now as your vehicle, the police  
15 vehicle, pulled up, you said there were two black  
16 males on the sidewalk and they ran away?

17 A. Yes.

18 Q. So they would be to the left-hand side of  
19 the Johnson vehicle?

20 A. Correct.

21 Q. And did you ever -- you never found out  
22 their names?

23 A. No.

1 Q. And then Mr. Johnson you say was in the  
2 driver's seat?  
3 A. Correct.  
4 Q. And then there was a girl in his lap?  
5 A. Correct.  
6 Q. Was there someone in the front passenger  
7 seat?  
8 A. Yes.  
9 Q. Was it one person, two people?  
10 A. One -- when I got out of the car I focused  
11 on the driver. I didn't even notice the passenger  
12 until later on.  
13 Q. Okay. But there was someone in the  
14 passenger seat?  
15 A. Correct.  
16 Q. Was that a black male?  
17 A. Yes.  
18 Q. Was there anyone in the back seat?  
19 A. No.  
20 Q. Besides the two men or the two black males  
21 that were on the sidewalk who ran, there were more  
22 black males on the sidewalk?  
23 A. Black females.

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1 Q. Black females?  
2 A. Yes.  
3 Q. So on the sidewalk were two black males, two  
4 black females?  
5 A. I can't give you a number of how many black  
6 females. There were several people up against the  
7 fence line.  
8 Q. Okay. And the fence would be right beyond  
9 the sidewalk, to your left?  
10 A. Correct. Where the sidewalk ends there was  
11 a fence.  
12 Q. And then so you had outside of the car four  
13 to five people perhaps?  
14 A. Like I said, I can't give you the specific  
15 number. It was probably four to seven people,  
16 somewhere in that vicinity.  
17 Q. And what time of day was this?  
18 A. Approximately 10:50 p.m.  
19 Q. 10:50 at night?  
20 A. Yes.  
21 Q. And were there streetlights there?  
22 A. Yes.  
23 Q. And it was illuminated also by your

1 headlights?  
2 A. Yes.  
3 Q. And the interior light also was on? That  
4 was on?  
5 A. Yes.  
6 Q. Was the passenger side door open?  
7 A. No.  
8 Q. Was the car a four door or two door?  
9 A. Four door.  
10 Q. Were any of the back doors open?  
11 A. No.  
12 Q. It was just the front driver's side?  
13 A. Correct.  
14 Q. Now, when you got out, you were in the back  
15 seat?  
16 A. Yes.  
17 Q. Okay. Did you run towards this vehicle?  
18 A. I walked briskly. I wouldn't say I ran.  
19 Q. And some of the people took off, some of the  
20 people stayed there and then you saw Mr. Johnson  
21 push the girl off his lap?  
22 A. Correct.  
23 Q. And this happened all in the space between

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1 where Mr. Miller was standing and where you were  
2 sitting down?  
3 A. Yes.  
4 Q. Now, as you got there -- obviously you  
5 couldn't see what was going on behind the driver's  
6 door that was open, correct?  
7 A. Correct.  
8 Q. And you never ever saw a gun in  
9 Mr. Johnson's hand, correct?  
10 A. Correct.  
11 Q. But there was a bunch of body movement, and  
12 then you heard metal?  
13 A. Correct.  
14 Q. And was the door moving as the girl got off  
15 of Mr. Johnson's lap and went to the sidewalk?  
16 A. No. The door was as far open as it could  
17 go.  
18 Q. But you didn't push it so it went back  
19 further?  
20 A. No. It was already open.  
21 Q. But did it move at all?  
22 A. No. He lifted and pushed her off and she  
23 went up towards the fence line.

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1 Q. Now, you went and you looked under the car  
 2 and you found a gun?  
 3 A. Correct.  
 4 Q. Did you pick the gun up?  
 5 A. Yes.  
 6 Q. And how did you pick the gun up?  
 7 A. I tried to pick it up in areas on the gun so  
 8 I wouldn't mark any fingerprints that might be on  
 9 it, disturb it.  
 10 Q. So how would you do that?  
 11 A. Use my finger -- or my thumb and my  
 12 forefinger, and touching it in areas where there  
 13 was grooves on the grips.  
 14 Q. Did you have to get down on your hands and  
 15 knees to reach under the car?  
 16 A. Yes.  
 17 Q. And then you had to reach full arm length  
 18 under the car?  
 19 A. I would say probably two, two-and-a-half  
 20 feet from the curb.  
 21 Q. Okay. And did you have a flashlight?  
 22 A. I don't recall if I did or not.  
 23 Q. And then you grabbed the gun and I guess you

1 direction; is that correct?  
 2 A. Yes.  
 3 Q. Now, and there were a lot of people in the  
 4 street when you first pulled up?  
 5 A. No, they were on the sidewalk.  
 6 Q. They were on the sidewalk?  
 7 And where was Johnson's car?  
 8 A. Parked.  
 9 Q. Right next to the sidewalk?  
 10 A. Probably about 10, 12 inches from the  
 11 sidewalk.  
 12 Q. And the driver's side door, would that have  
 13 been next to the sidewalk or away from the  
 14 sidewalk?  
 15 A. Next to the sidewalk.  
 16 Q. Next to the sidewalk, okay.  
 17 So the people that were standing on the  
 18 sidewalk would have been standing close to the car?  
 19 A. I would say within eight to ten feet. They  
 20 were mostly up along the fence line.  
 21 Q. Okay. And two guys run?  
 22 A. Correct.  
 23 Q. Okay. Now, did they run past the car?

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1 tried not to put your own fingerprints on it?  
 2 A. Correct.  
 3 MR. HEYDEN: Okay. Thank you.  
 4 THE COURT: Mr. Figliola?  
 5 MR. FIGLIOLA: Thank you, Your Honor.  
 6 BY MR. FIGLIOLA:  
 7 Q. Good afternoon, Detective.  
 8 A. Good afternoon.  
 9 Q. How long did you say you had been on the  
 10 Vice squad when this incident occurred?  
 11 A. It was my first day.  
 12 Q. Your very first day?  
 13 A. Yes.  
 14 Q. Pretty good catch for your very first day,  
 15 wasn't it?  
 16 A. I guess you could say so.  
 17 Q. Now, the Johnson vehicle, you approached  
 18 that you said -- if I'm wrong, fine. Did you  
 19 approach that from the rear of the vehicle or the  
 20 front of the vehicle?  
 21 A. From the front of the vehicle.  
 22 Q. Okay. And that's because you entered the  
 23 street -- you entered a one-way street in the wrong

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1 A. They ran the opposite direction that we  
 2 came. They were running westbound. I'm sorry,  
 3 they were running in the same direction that we  
 4 came. They were running westbound. I'm sorry,  
 5 they were running eastbound.  
 6 Q. Eastbound, okay.  
 7 They were running away from you?  
 8 A. Yes.  
 9 Q. Were they black males?  
 10 A. Yes.  
 11 Q. Could you tell how big they were, young,  
 12 age, nothing?  
 13 A. No.  
 14 Q. You didn't pursue them, did you?  
 15 A. No.  
 16 Q. Anybody else run?  
 17 A. Other than those two, no.  
 18 Q. Okay. How many people were still left out  
 19 there?  
 20 A. I can't give you a specific number. I would  
 21 say four, five to seven, somewhere in that general  
 22 vicinity.  
 23 Q. And the Dodge Stratus, was that behind the

1 Lumina?  
2 A. Yes.  
3 Q. How close to the Lumina was the Stratus?  
4 A. A couple of feet.  
5 Q. A couple of feet?  
6 A. Yes.  
7 Q. And who focused on the Dodge Stratus?  
8 A. Detective Richie.  
9 Q. Okay. And you and Detective Taylor focused  
10 on the Lumina?  
11 A. Correct.  
12 Q. And did you have your guns drawn when you  
13 first got out of your police vehicle?  
14 A. I didn't. I can't speak for anybody else.  
15 I don't know.  
16 Q. Okay. Now, you said that someone was  
17 sitting in Mr. Johnson's lap, a female?  
18 A. Yes.  
19 Q. When Detective Taylor or Detective Richie,  
20 which one, orders their hands up and out of the  
21 car, was that standard police protocol?  
22 A. He just ordered show your hands. He didn't  
23 say anything about out of the car, just ordered

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1 show your hands.  
2 Q. Okay. So the female passenger sitting  
3 on -- if you know. The female passenger sitting on  
4 Johnson's lap didn't get out on the command of  
5 Detective Taylor?  
6 A. While Detective Taylor kept repeating that  
7 phrase show your hands, Mr. Johnson lifted her and  
8 kind of pushed her out at that point.  
9 Q. He lifted her with two hands?  
10 A. He used his left hand down low and his right  
11 hand.  
12 Q. So you could see both of his hands?  
13 A. No. I could see his right hand.  
14 Q. So you just said that his left hand was down  
15 below and his right hand was up top. That's not  
16 right, is it?  
17 A. By the motions that I saw, his left hand was  
18 down low, because as she is getting up, his left  
19 arm was moving up also. His hand was out of my  
20 view though.  
21 Q. Then after she gets out of the car what does  
22 he do, sit back down?  
23 A. He never got up at that point. He was still

1 sitting in the same position.  
2 Q. Where was his left hand at this time?  
3 A. Still out of my view.  
4 Q. Where was his right hand?  
5 A. His right hand was in my view for a very  
6 brief time and then went back down out of my view.  
7 Q. Which hand do you believe he had the gun in?  
8 A. I don't know.  
9 Q. You don't know. When you saw him push the  
10 girl out of the car with his right hand, you saw  
11 his right hand?  
12 A. At that point, yes.  
13 Q. So he didn't have a gun in his hand, did he?  
14 A. No, not at that point, no.  
15 Q. So you believe maybe he got the gun after  
16 the fact, is that what you're saying?  
17 A. There's a possibility, yes.  
18 Q. Anything is possible, right?  
19 A. Yes.  
20 Q. Okay. Now, Mr. Johnson told you it wasn't  
21 his gun when you found it, didn't he?  
22 A. Yes.  
23 Q. Now, where was the gun actually located?

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1 A. When I recovered it it was about 2,  
2 two-and-a-half feet underneath the vehicle on the  
3 ground, right -- or right underneath the front  
4 seats of the car but on the ground outside.  
5 Q. Underneath the car?  
6 A. Correct.  
7 Q. About two-and-a-half feet under?  
8 A. Between two, and two-and-a-half feet.  
9 Q. How many times did you hear this gun bounce  
10 on the asphalt?  
11 A. Once.  
12 Q. Just once. You didn't actually see  
13 Mr. Johnson throw a gun, did you?  
14 A. No, I didn't.  
15 Q. Now, how many people were actually around  
16 the Johnson vehicle when this all occurred?  
17 A. Can you just give me a definition of how  
18 close you mean by around? Because there were  
19 several people on the fence line. Nobody was up to  
20 any of the windows.  
21 Q. Okay. And your focus was directly on  
22 Mr. Johnson, correct?  
23 A. Correct.

A18

1 Q. So if somebody walked up to the Lumina,  
2 you're focusing on Johnson, you wouldn't even have  
3 seen them, would you?  
4 A. Not unless they were right by Mr. Johnson.  
5 Q. Okay. I think you previously told  
6 Mr. Heyden there was five to seven feet in the  
7 general vicinity?  
8 A. Along the fence line, yes.  
9 Q. So you don't consider along the fence line  
10 along the Lumina?  
11 A. That's about, I would say, approximately  
12 eight to ten feet away.  
13 Q. So if you were saying they're eight to ten  
14 feet away, they're not around the Lumina, right?  
15 A. Correct.  
16 Q. Now, do you remember testifying at a  
17 previous proceeding involving this matter?  
18 A. Yes.  
19 Q. And do you remember testifying that there  
20 were five or seven people? The question was asked,  
21 was there anybody standing around the Lumina. This  
22 is 52 and 53.  
23 Do you recall being asked whether there were

1 We are going to have to wrap it up,  
2 Mr. Figliola. We can bring the witness back  
3 tomorrow if you have --  
4 MR. FIGLIOLA: I'm probably only going to  
5 have one more question if we get this revolved,  
6 Your Honor.  
7 THE COURT: All right.  
8 BY MR. FIGLIOLA:  
9 Q. I just want to get back. Obviously you're  
10 trained to pick up a vehicle -- I mean a weapon,  
11 right?  
12 A. Yes.  
13 Q. You picked up a weapon so your prints do not  
14 get on the weapon?  
15 A. The best I can, yes.  
16 Q. Okay. And you did that, correct?  
17 A. Yes.  
18 Q. Now, when you say it was dusted for latent  
19 prints, were there latent prints --  
20 A. I didn't personally dust it. It was taken  
21 to the evidence unit to be dusted and I was told  
22 there were no prints on it.  
23 Q. When you say no prints, that means no prints

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1 other individuals around the Lumina?  
2 A. Vaguely, yes.  
3 Q. And do you recall saying there were five to  
4 seven in the area?  
5 A. Vaguely, yes.  
6 Q. Okay. But what you're saying here today  
7 when you said area, you didn't mean next to the  
8 Lumina?  
9 A. Well, area I consider -- I'm not giving a  
10 specific area.  
11 Q. Okay. But you were specifically asked in  
12 the area of the Lumina, were you not?  
13 A. Yes, I believe so.  
14 Q. Okay. And you said five to seven people.  
15 Now, when you say that you took latent fingerprints  
16 of the gun --  
17 MR. MILLER: Excuse me, Your Honor. May I  
18 have just one moment?  
19 THE COURT: While they're conferring, we  
20 went a little past 5 o'clock and I want to know  
21 whether that is a problem.  
22 Is that starting to present a problem for  
23 some of you? All right.

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1 at all, not Mr. Johnson's, not anybody else's?  
2 A. I don't know if it means no prints. No  
3 identifiable prints. There was negative results  
4 for it.  
5 Q. Negative results for Mr. Johnson?  
6 A. Correct.  
7 MR. FIGLIOLA: Nothing further.  
8 RE-DIRECT EXAMINATION  
9 BY MR. MILLER:  
10 Q. Is that uncommon, Detective Silvers, when it  
11 comes to a firearm for it to be processed for  
12 latent fingerprints and there to be no identifiable  
13 fingerprints on it?  
14 A. Is it common? Yes, it's very common.  
15 Q. Common that there are no identifiable  
16 fingerprints?  
17 A. Right.  
18 Q. Turning your attention to a couple other  
19 issues, you indicated that you were focused on the  
20 driver, not so much the passenger?  
21 A. Correct.  
22 Q. Mr. Figliola asked you whether or not the  
23 passenger door was open. You said --

1 A. No.  
2 Q. And you indicated later that the passenger  
3 was a -- in terms of race and sex?  
4 A. Black male.  
5 Q. And do you remember what his name was?  
6 A. I believe it was Ronald Wallace.  
7 Q. Okay. Did he ever make any motions,  
8 anything like the motions you saw Mr. Johnson make?  
9 A. I was focused on Mr. Johnson. I couldn't  
10 tell you.  
11 Q. Did you ever see his door open during any of  
12 this time?  
13 A. No.  
14 Q. One other question. As far as what was  
15 underneath the car, you indicated you looked under  
16 the car and the gun was there. Was there anything  
17 else under there other than the gun?  
18 A. No.  
19 MR. MILLER: Nothing further, Your Honor.  
20 THE COURT: Mr. Heyden.  
21 MR. HEYDEN: Just one.  
22 RECROSS-EXAMINATION.  
23 BY MR. HEYDEN:

1 A. I couldn't see anything, no.  
2 MR. FIGLIOLA: Thank you.  
3 MR. MILLER: Prompts no redirect from me,  
4 Your Honor.  
5 THE COURT: Very well.  
6 Mr. Heyden.  
7 MR. HEYDEN: Nothing. Thank you, Your  
8 Honor.  
9 THE COURT: All right. That completes your  
10 testimony. You may step down.  
11 Ladies and Gentlemen, we will resume -- I  
12 didn't talk to counsel yet -- at 10 a.m.  
13 MR. MILLER: Sounds good, Your Honor.  
14 THE COURT: We will resume tomorrow morning  
15 at 10 a.m. Once again, I remind you please do not  
16 discuss the case. Please do not do any of your own  
17 investigation. Please do not check out the  
18 streets. Please do not do anything at all.  
19 Everything you use as the basis for your  
20 decision has to come to you in this court room.  
21 All right? No conversations.  
22 See you tomorrow at 10. Thank you.  
23 (Jury leaves courtroom at 5:15.)

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1 Q. I understand that your focus was on the  
2 driver, but would it be fair to say that when the  
3 police got there the police got everybody out of  
4 the car including the passenger?  
5 A. Yes.  
6 Q. Okay. So then the front passenger door did  
7 open and Mr. Wallace got out?  
8 A. At some point, yes. I didn't observe it  
9 though.  
10 Q. Okay. So you didn't know what Mr. Wallace  
11 had in his hand or what he did?  
12 A. Detective Taylor was focused on Mr. Wallace.  
13 I don't know.  
14 MR. HEYDEN: Thank you.  
15 THE COURT: Mr. Figliola?  
16 MR. FIGLIOLA: Briefly along those same  
17 lines, Detective.  
18 BY MR. FIGLIOLA:  
19 Q. As you drove up, people started to scatter,  
20 two people ran?  
21 A. Two people ran, yes.  
22 Q. Did you take notice of whether anybody threw  
23 anything or discarded of anything?

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1 THE COURT: All right, counsel. Can we just  
2 calm down for just a minute here. Can I hear from  
3 the State what your plan is for tomorrow.  
4 MR. GEORGE: Yes. We are going to move into  
5 1348, home invasion at 1348, and then the  
6 collection of evidence there, and then we have an  
7 ATF agent coming down to talk about ballistics.  
8 THE COURT: Okay. Was there -- I recall a  
9 motion in limine that had to do with the Lancaster  
10 Avenue testimony evidence. Is there an issue from  
11 the defense side?  
12 MR. FIGLIOLA: Not from defendant Johnson.  
13 Your Honor.  
14 Your Honor, while they're speaking there is  
15 something maybe we can address and it's -- this  
16 case, as you are aware, I think is going faster  
17 than anybody has anticipated.  
18 I initially -- and I can't speak for Mr.  
19 Heyden. I subpoenaed my witnesses for Tuesday and  
20 now it looks like I may have to try to get them  
21 here on Monday.  
22 THE COURT: We can delay.  
23 MR. FIGLIOLA: Thank you.

A20